

**CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR ABILITY TO PAY PERIPHERAL PARTIES**

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IN THE MATTER OF:)	ADMINISTRATIVE AGREEMENT
)	
SUPERIOR WASTE ROCK)	
Superior, Montana)	U.S. EPA Region 8
)	CERCLA Docket No. CERCLA-08-2006-0006
MINERAL COUNTY)	
SUPERIOR SCHOOL DISTRICT)	SETTLEMENT UNDER SECTION
TOWN OF SUPERIOR)	122(h)(1) OF CERCLA
Settling Parties)	42 U.S.C. § 9622(h)(1)
_____)	

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D.

2. This Agreement is made and entered into by EPA and Mineral County, the Superior School District, and the Town of Superior (“Settling Parties”). Settling Parties consent to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Superior Waste Rock Site (“Site”) located in Mineral County, Town of Superior, Montana. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. The Site consists of several areas within Mineral County where the County, the Town and/or the School District collected soils contaminated with heavy metals (lead and arsenic) from the banks of the Clark Fork River and used those soils for various construction fill purposes.

5. In 2002, EPA conducted an emergency response action to address these areas of contamination. Removal activities included excavation and consolidation of approximately 5,300 yards of contaminated soil in a constructed cell located at the municipal airport. Excavated areas were backfilled and vegetation was restored. Institutional Controls to protect EPA's response action are also part of the remedy, and Settling Parties will implement the Institutional Controls as part of this Agreement.

6. In performing response actions at the Site, EPA incurred response costs of approximately \$1.1 million dollars through February 2006. It is not expected that any additional significant response costs will be incurred in the future.

7. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at the Site.

8. EPA has reviewed the financial information submitted by Settling Parties to determine whether Settling Parties are able to pay response costs incurred by EPA at the Site. Based upon this financial information, EPA has determined that none of the Settling Parties has the financial ability to pay for response costs incurred.

9. EPA and Settling Parties recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

10. This Agreement shall be binding upon EPA and upon Settling Parties and their heirs, successors and assigns. Any change in ownership or corporate or other legal status of Settling Parties, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Parties' responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

10. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by recognizing that Settling Parties have no financial ability to make a cash payment to address their alleged civil liability for the Site. In consideration for this Agreement, Settling Parties promise to perform the requirements found herein, including, but not limited to, the placement of protective land use restrictions on certain areas within the Site.

V. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

e. "Institutional Controls" shall mean those provisions found in the "Institutional Controls and Use Restrictions," the requirements of which are incorporated herein by this reference, and which are attached as Appendix A.

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and Settling Parties.

h. "Property" shall mean that portion of the Site, defined for the purpose of Institutional Controls and the Federal Lien proposed in this agreement. The Property is more specifically depicted in Appendix B.

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

j. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

k. "Settling Parties" shall mean Mineral County, Superior School District, Town of Superior ("Settling Parties").

l. “Site” shall mean the Superior Waste Rock Superfund site, encompassing areas within the Town of Superior in Mineral County, Montana, and as generally depicted in the drawings attached as Appendix B.

m. “Transfer” shall mean each sale, assignment, exchange or other transfer by Settling Parties (or their successors or heirs) of all or any portion of the Site, or of the entity owning all or any portion of the Site, where title to the Site (or any portion or interest thereof) or to the entity owning the Site: i) is transferred and Fair Market Value is received in consideration, or ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on the indebtedness secured, in whole or in part, by all or any portion of the Site, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.

n. “United States” shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

12. EPA has conducted an investigation and analysis of Settling Parties’ financial circumstances and has determined that Settling Parties currently do not have the financial ability to make any cash payment to address their alleged civil liability at the Site.

VII. SITE ACCESS AND INSTITUTIONAL CONTROLS

13. Commencing upon the effective date of this Agreement, Settling Parties agree to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Parties to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site.
- f. Assessing Settling Defendants' compliance with this Agreement; and

g. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Agreement.

14. Commencing on the effective date of this Agreement, Settling Parties shall refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the Site response. Such restrictions are defined as Institutional Controls, and are attached as Appendix A. Settling Parties agree to fulfill all Notice and Recording requirements necessary to fully implement the Institutional Controls referred to throughout this Agreement. Within 45 days of entry of this Agreement, Settling Parties shall execute and record each Institutional Control in the Office of the Clerk and Recorder of Mineral County, Montana and within 30 days of recording the Institutional Controls, Settling Parties shall provide EPA with a certified copies of each of the original recorded Institutional Controls, showing the clerk's recording stamps.

15. If the Site or any other property where access and/or land/water use restrictions are needed to implement this Agreement is owned or controlled by persons other than any of the Settling Parties, Settling Parties shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Parties as well as for EPA on behalf of the United States, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Agreement. including, but not limited to, those activities listed in Paragraph of this Agreement;

b. an agreement, enforceable by the Settling Parties and the United States, to refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Agreement.

For purposes of Paragraph 15 of this Agreement, “best efforts” includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, restrictive easements, and/or an agreement to release or subordinate a prior lien or encumbrance.

16. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

VIII. COVENANT NOT TO SUE BY EPA

17. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Parties

pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. With respect to present and future liability, this covenant shall take effect upon the recording of Institutional Controls by the Settling Parties. This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue is also conditioned upon the veracity and completeness of the financial information provided to EPA by Settling Parties. If the financial information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Parties this covenant not to sue shall be null and void. This covenant not to sue extends only to Settling Parties and does not extend to any other person or other entity.

IX. RESERVATIONS OF RIGHTS BY EPA

18. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all matters not expressly included within the Covenant Not to Sue by EPA set out above. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties with respect to:

- a. liability for failure of Settling Parties to meet a requirement of this Agreement;
- b. criminal liability;
- c. liability, based upon Settling Parties' operation of the Site, or upon Settling Parties' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Settling Parties; and
- d. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

19. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the financial information provided by Settling Parties, or the financial certification made by Settling Parties in Paragraph 32(b), is false or, in an material respect, inaccurate.

20. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTIES

21. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site, except as provided in those paragraphs referencing waiver of claims and waiver of claim-splitting defenses, these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 18(a) - (d), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

22. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

23. Settling Parties agree not to assert any claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that the Settling Parties may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Parties.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

24. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

25. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred,

at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Parties coming within the scope of such reservations.

26. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been addressed in this Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA.

XII. FAILURE TO COMPLY WITH AGREEMENT

27. Stipulated Penalties

a. If Settling Parties do not comply with each requirement of this Agreement, Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$100.00 per violation per day of such noncompliance.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. Interest shall be due and payable on any unpaid stipulated penalties.¹ 1 “Interest,” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Parties, the Site name, the EPA Region and Site/Spill ID #ER and the EPA docket number for this action, and shall be sent to:

Regular Mail:

EPA Superfund
Mellon Bank
EPA Region 8
Attn: Superfund Accounting
Post Office Box 360859
Pittsburgh, Pennsylvania 15251-6859

Via Express or Overnight Mail:

U.S. Environmental Protection Agency
Mellon Client Services Center
500 Ross Street, Room 154-0670
Pittsburgh, Pennsylvania 15262-0001

Wire Transfer:
ABA=021030004
TREAS MUC/CTR/
BNF=/AC-68011008

c. At the time of each payment, Settling Parties shall send notice that such payment has been made to EPA's Enforcement Specialist for this Site, Maureen O'Reilly, at 999 18th Street, Suite 300, ENF-RC, Denver, CO 80202. Such notice shall identify the Region and Site-Spill ID # ER and the EPA Docket Number for this action.

d. Stipulated penalties shall accrue as provided above regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due, or the day a violation occurs, and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

28. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Parties' failure to comply with the requirements of this Agreement, if Settling Parties fail or refuse to comply with any term or condition of this Agreement, they shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

29. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

XIII. CERTIFICATION

30. Settling Parties hereby certify that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the state or the filing of a

suit against it regarding the Site and that it has fully complied with any and all EPA requests for documents or information regarding the Site and Settling Parties' financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927;

b. submitted to EPA financial information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Parties execute this Agreement; and

c. fully disclosed the existence of any insurance policies that may cover claims relating to cleanup of the Site.

XIV. NOTICES AND SUBMISSIONS

31. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

Maureen O'Reilly, Superfund Enforcement
US EPA, Region 8 (ENF-RC)
999 18th Street, Suite 300
Denver, Colorado 80202-2466

As to Settling Parties:

Mineral County
Shaun Donovan, County Attorney
300 River Street, County Courthouse
Superior, MT 59872-0550
Superior School District
Superintendent of Schools
P.O. Box 400
Superior, MT 59872

Town of Superior
Supervisor of Public Works
305 Main Street
Superior, MT 59872

XV. INTEGRATION/APPENDICES

32. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement:

Appendix A provides Institutional Controls and Use Restrictions for the Property, to run with the land.

Appendix B is a survey drawing of that portion of the Site known as the Property.

XVI. PUBLIC COMMENT

33. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

34. The effective date of this Agreement shall be five business days after signature by all parties to this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency:

Kelcy Land for/ _____
Sharon L. Kercher, Director
Technical Enforcement Program, ENF-RC
U.S. Environmental Protection Agency, Region 8

07/10/06 _____
Date

SIGNED

Michael T. Risner
Director, Legal Enforcement Program, ENF-L
U.S. Environmental Protection Agency, Region 8

7/10/06

Date

Settling Parties:

SIGNED

James Warnken, Chair
Board of County Commissioners
County of Superior, Montana

5/14/06

Date

SIGNED

Michael Wood, Mayor
Town of Superior, Montana

5/14/06

Date

Kristie Hardebeck

Superior School District Board of
Trustees, Superior, Montana.

5/14/06

Date

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS PLEASE CONTACT
THE REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S
OFFICE ON SEPTEMBER 8, 2006.**